

Paradoxes of Ukraine's fourth estate

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May 3, the World Press Day, was broadly noticed in Ukraine for the first time lately, as a good chance to think again about the freedom of speech - or the lack of it - in Ukraine, on dependence or independence of the Ukrainian media.

Discussions of this general issue and its possible variations have been increasingly frequent: the current realities of the country's development produce plenty of material for questions whether the media in Ukraine are really the fourth estate, as the role of the media is perceived in established democracies, or simply servicing agencies for the branches of the state tree, individual members of the Ukrainian political class or those who are routinely referred to as representatives of oligarchic structures.

This year the May 3 day was marked by the Action of Free Journalists, the Wave of Freedom. The action started on April 13, 2000, in Lviv, where journalists of a local newspaper, the Express, protested against the pressure of local authorities and the court judgment ordering them to pay multi-thousand compensation for moral damages, reportedly caused by a 12-line note published several months ago. At the beginning of May the Freedom Barricade built by the protesters was moved from Lviv to Kyiv. The journalists demanded amending the Ukrainian legislation so that to specify the upper limit of compensation for moral damages that can be demanded on a media outlet, and to introduce criminal liability of civil servants for deliberately preventing journalists from performing their professional duties. The demands were supported by 198 newspapers, 19 TV stations, 36 radio stations, and chairman of the parliamentary Committee for Freedom of Speech and Information Oleksandr Zinchenko and chairman of the National Association of Journalists of Ukraine Igor Lubchenko.

Although attitudes to the action itself may vary - for there have been a number of those willing to benefit from the free publicity created by the event - the Wave of Freedom highlighted key problems of the Ukrainian media development. Currently it is still unclear whether the spark will actually grow into fire, as the effect of the action still remains to be evaluated. Yet, the Ukrainian realities have been creating increasingly favorable conditions for proliferation and radicalization of journalists' protests. As Igor Lubchenko put it, every year the strain on the freedom of speech in Ukraine becomes increasingly blatant...

In May 1999, the US-based International Committee for Protection of Journalists included the name of Ukrainian President Leonid Kuchma to the list of top ten enemies of the press, alongside with leaders of some African and Asian dictator regimes and the President of Yugoslavia Slobodan Milosevic. Shortly after the news reached Ukraine, Leonid Kuchma stated that had been his enemies' conspiracy. I can tell you with absolute responsibility that behind my position [in the ranking] there is one of Ukraine's political forces that bought that position for money for the President of Ukraine. That is it. Everything in the world can be sold and bought, including in the United States of America (Den, September 1, 1999). Commenting on the nomination of the Ukrainian President among the enemies of the press, U.S. Ambassador to Ukraine Stephen Pifer argued he could not imagine how that ranking was formed. According to Mr. Pifer, knowing problems faced by the media in other countries worldwide, he would not regard the Ukrainian press as being among the ten most suppressed ones in the world (Fakty I Kommentarii, September 17, 1999).

In 2000, the Ukrainian President's name was not in that list. Either the situation with the freedom of expression in Ukraine had improved, or it had gone worse somewhere else, and there was a need to vacate the position for new media-unfriendly leaders - like, for instance, President of Kazakhstan Nazarbayev. Yet, no position in any sort of ranking can reflect the acute and multidimensional problem of the media freedom in Ukraine in full. The challenges faced by the media in this country have to be considered in the context of civil society building that Ukraine has been trying to pursue for almost a decade.

As of the end of 1999, Ukraine had 8,300 officially registered print media (though only about 3,000 of them published regularly), and over 800 TV and radio stations. Hence, compared to mid-1990s, there has been a noticeable increase in numbers. Though, the growth process has been accompanied and largely determined by the development of relations between the media and the national and local authorities. The issue of the status of the freedom of expression and ways to promote media independence have occupied a prominent place in the civil society-building agenda.

No matter how indefinitely broad the issue may appear, the current challenges to the media in Ukraine can be classed into issues related to the imperfection of the legal framework, the issue of direct or indirect dependence of

the media on certain financial-political circles, and fully legitimate mechanisms of influencing the media that at certain points may be easily transformed into pressure. Remarkably, the pressure in such cases will be exerted through mechanisms that are completely within the law.

As far as legal provisions for the media freedom and journalism are concerned, one should note that Ukraine's media laws are among the most democratic ones in the post-Soviet states. Specifically, Article 15 of the Constitution of Ukraine declares that censorship is prohibited. According to Article 34 of the Constitution of Ukraine, everyone is guaranteed the right for the freedom of thought and speech, for free expression of his views and beliefs. The parliament of Ukraine adopted relevant bills - On Information, On the Print Media, On Television and Radio Broadcasting, On the National Council for Television and Radio Broadcasting, On Information Agencies, On Advertising, On the Order of Covering Activities of Bodies of State Power and Local Self-Governance, On Public Television, On State Support for the Mass Media and Social Protection of Journalists. The bills have shaped the legal framework for the media operation. However, one of key challenges to the media freedom in Ukraine today is the possibility to interpret the law in such a way as to gain opportunities of indirect pressure on the media.

The last of the above list of bills, On State Support for the Mass Media and Social Protection of Journalists was approved by the parliament in 1997 and created legal provisions for the state to support the selected media which, in their turn, would support the state machine and its individual elements. Provisions of the law On Information - adopted, by the way, in October 1992 - stipulating the right to receive information and liability for refusal to provide it are practically unenforced today.

There is yet another major problem: unlike in established democracies, the Ukrainian law does not guarantee protection of the sources of information that can be disclosed only after a relevant court judgment. The lack of this norm often forces Ukrainian journalists to refrain from including any specific details in their publications that may allow identification of the source.

The relations of the Ukrainian media with the third estate, the judiciary, have not developed smoothly. The general picture of the number of lawsuits and trials against journalists and the media, and amounts of compensation for moral damages allegedly caused by media publications, was disclosed in December 1999 by then chairman of the parliamentary Committee for Freedom of Speech and Information Ivan Chyzh. He argued that the amount of compensation of moral damages claimed on journalists and the media through lawsuits totaled UAH 90 billion, though the total of compensations awarded to plaintiffs by the courts was far more modest - about UAH 1.5 million (Vechirniy Kyiv, December 14, 1999).

Last year Ukrainian media had been sued over 2,000 times for the total of UAH 90 billion, or almost three times as much as the country's whole budget. Commenting on the problem, Deputy Director of the Institute of Journalism Valery Ivanov argued that over 70 percent of lawsuits against the media are groundless. The plaintiffs just act dishonestly. In reality they do not seek protection for their honor and dignity, but [strive to] destroy the publication financially... (Express, Wave of Freedom).

This method of pressure on the media has become possible because the Ukrainian legislation does not clearly specify criteria of liability of a journalist and, on the other hand, does not stipulate that a claimed compensation cannot be large enough to drive the publication bankrupt. Therefore, lawsuits, claiming exorbitant amounts as compensation for moral damages have been used as an indirect mechanism of exerting financial pressure on the media and the best way to limit the freedom of expression. Remarkably, the possibility was suggested to power brokers trial procedures. Within a short period of time they imposed the functions of an instrument of financial pressure on the media on the courts. While a compensation for physical harm caused to a person, awarded by the court, normally does not exceed 200 minimum salaries (currently an equivalent of about US\$ 4,800), journalist and the media were demanded hundreds of thousands or even millions for moral damages they had allegedly caused.

This absurd habit of civil servants and politicians to use the court against the media by claiming disproportionately large financial compensations could be limited by amending the legislation with a provision that a certain deposit (at least 30 percent of the claimed compensation) should be made by the plaintiff. The National Association of Journalists of Ukraine, led by Igor Lubchenko, campaigned for introducing such an amendment jointly with a number of newspaper editors. In 1997 they appealed to the Chairman of the Supreme Court, urging to clarify the notion and features of moral damages, though regarding the idea to be a democracy gain that is proper for a civilized state (Pravda Ukrainy, June 13, 1997). The journalists demanded that moral damages lawsuits be suspended until relevant clarifications were made. Obviously, their campaign was in vain, for the quite legal method of suppressing the freedom of speech was too convenient for power brokers to give up. In 1998 journalists made another effort to initiate parliamentary debates on amendments that would disallow disproportionately high claims for moral damages caused by media publications. President Leonid Kuchma also promised to propose a draft amendment to the current media legislation that, if adopted by the parliament, would oblige the plaintiff to deposit 20 percent of the claimed damages and, if the case against the media outlet is lost by the plaintiff, the deposit would

be transferred to the state budget (Kievskie Vedomosti, July 7, 1997). However, no change has occurred, and lawsuits of offended civil servants and politicians have led to liquidation of whole media teams. The problems of the troubled relationship between the media and authorities deteriorated during election campaigns. In 1998, a lawsuit resulted in a major halt of the Vseukrainskie Vedomosti. By the judgment of the Chernivtsi regional court, the newspaper had to pay UAH 3.5 million to the Dynamo Kyiv Football Club for publishing information about a planned US\$ 17 million contract of the club's lead player, Andriy Shevchenko, with the Milano club. Thus, the high-ranking football fans dealt a skillful blow to the publication that sympathized with ex-prime Minister Pavlo Lazarenko. In June 1998 a Kyiv-based borough court ordered the Kievskie Vedomosti to pay UAH 5 million as moral damages to Minister of the Interior Yuri Kravchenko for a series of articles charging him with power abuse and misuse of public funds. Two authors of the articles also were ordered to pay the plaintiff UAH 20,000 and UAH 7,000. However, half a year later the Supreme Court of Ukraine annulled the borough court's judgment.

The Ukrainian media have their steady political preferences. There is the whole spectrum of officially partisan publications, like the Socialist Party's *Tovarysh*, the Communist Party's *Komunist*, or the *Chas* newspaper of the wing of the *Rukh* led by Hennady Udovenko. The *Silski Visti* were consistent in their support for the Peasants' Party leader Oleksandr Tkachenko and chairman of the Socialist Party Oleksandr Moroz. In addition, there are numerous formally independent publications that are focused on reflecting perspectives of other political forces and their leaders. The national information environment has been strictly divided between allies, antagonists, and oligarchs. Involved in the general political process, the media have been used to reflect it in a way seen as appropriate by their true owners and sponsors.

Once president of the Interfax Ukraina Information Agency Oleksandr Martynenko, subsequently the press secretary for the President of Ukraine, admitted that there is no genuinely independent press in Ukraine. But this is true for the whole world: a specific feature of the print media is that all publications are financed by these or those structures. (Den, March 26, 1998). Another well-known Ukrainian journalist and an ORT Ukrainian correspondent argued that all media outlets have their master, every master has interests. Like his interests, like the media's focus (Den, February 10, 2000). The multiple comments of this kind reflect the existence of peculiar inner censorship that restrains every individual journalist.

The Ukrainian media suffer, among other things, from indirect but actually very effective methods of pressure like abrupt abolition of facility rent or equipment lease contracts and numerous inspections by taxation authorities or representatives of local fire fighting departments. The methods were used during the 1999 presidential election campaign. Some media received formally motivated visits of taxation authorities, fire and a variety of other inspections, too frequent to be justified. Yet, the method proved to be effective when used in this country's neighbor state that appears to serve as a model for most of election techniques applied in Ukraine. A Moscow-based publication, *Kommersant*, known to be strongly critical of the Moscow government, was closed down with the help of the Moscow fire inspection. In most of cases, charges made by inspection agencies are fully legitimate. In the current heavily regulated environment, inconsistent legislation and broad opportunities for discretionary actions of inspection authorities, it is not difficult to find evidence of noncompliance practically anywhere. Yet, to a certain point inspectors prefer to turn the blind eye to such facts/ their scrutiny is highly selective, and choice of individual targets suggest bias. As deputy editor-in-chief of *Zerkalo Nedeli* Yulia Mostova put it, only those who are friendly with the authorities may afford such noncompliance (Den, August 28, 1999). No wonder zealous inspections by taxation authorities and fire departments was noticed by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, and members of the Monitoring Committee suggested that the Ukrainian leadership should introduce a moratorium on exerting pressure on the media and refrain from sanctioning inspections of the media by taxation and fire authorities until the end of the presidential election campaign (Vechirniy Kyiv, October 7, 1999). Yet, the election campaign is over, but opportunities to harass journalists and the media remain.

The adoption, in May 1993, of an amendment that envisaged liability for dissemination of false information that may have damaged business reputation of an individual or an institution, opened new possibilities for using Ukraine's far from always independent third estate, the judiciary, for harnessing and muffling the fourth estate. Currently the law envisages disciplinary, administrative or criminal liability for humiliating honor and dignity of a person without differentiating between information about a private individual - whose right for privacy is protected in every democracy - and a civil servant or a public politician, whose job demands complete openness to public scrutiny. As long as the right of the society to receive complete and true information about actions of its elected leaders, representatives and civil servants is not really guaranteed by the law, there will be astronomic claims of compensations for humiliated honor and dignity made by authorities, and the declared freedom of expression will remain a predominantly theoretical option.

Although it is generally believed that the level of media freedom in Ukraine is noticeably higher than that in, say, Belarus or Kazakhstan, the very comparison suggests how deep and massive the problem is. In fact, as far as the freedom of speech is concerned, the comparison places Ukraine in the same class as the two other states. Analogies of this kind may be regarded as the best evaluation of the level of the Ukrainian media freedom. On the other hand, the broad public discussion of the level of the media freedom is itself an indicator of the presence of at least some degree of freedom. Journalists are aware of the harness that is being put on them, and their awareness of the lack of freedom to perform their professional duties properly is likely to reach the critical point soon. The evidence of that transforming awareness includes the recent massive Wave of Freedom, the emigration of a number of opposition journalists to Internet publications, and the Ukrainian authorities' attempts (so far unsuccessful) to establish control over the information that is being disseminated via the Internet. Yet, the majority of the Ukrainian media continue to choose the color of compromise, i.e., gray, and fail to perform their principle function of providing the society with true and complete information